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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No.

PETE MOLETON,

Petitioner,

vs.

UNION PACIFIC RAILROAD COMPANY, A CORPORATION, AND PACIFIC FRUIT EXPRESS COMPANY, A CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH AND BRIEF IN SUPPORT THEREOF

To The Honorable Chief Justice and Associate Justices of The Supreme Court of the United States:

The petition of PETE MOLETON respectfully shows:

Summary and Short Statement of Matter Involved

The Supreme Court of Utah in a case arising under the Federal Employers' Liability Act denied petitioner his right of trial by jury in a case where the evidence clearly demon-

strated that the petitioner was an employee of the defendant Union Pacific Railroad Company within the protection of the Federal Employers' Liability Act; that the Union Pacific Railroad Company had invented a device of using employees of another company to perform necessary services on its interstate trains with the purpose and intent to enable said railroad company to exempt itself from liability created by the Federal Employers' Liability Act in violation of 45 *U.S.C.A., Section* 55; that the Pacific Fruit Express Company was a common carrier by railroad in interstate commerce, subject to the liability created by the Federal Employers' Liability Act, and that the defendants, and each of them, were negligent in directing petitioner to turn off heaters in a hurry and contrary to safety rules, and that such negligence proximately caused in whole or in part injuries to petitioner.

Contrary to controlling decisions of this Court and to the Federal Employers' Liability Act, *Sections* 51 and 55, *Title* 45, *U.S.C.A.*, the trial court granted respondents' motion to dismiss plaintiff's cause of action. The Utah Supreme Court affirmed this decision on four grounds: (1) That as matter of law plaintiff was not an employee of the respondent Union Pacific Railroad Company and hence not within the protection of the Federal Employers' Liability Act. (2) That as matter of law the respondent Union Pacific Railroad Company had not used a device, the purpose and intent of which was to enable that respondent to exempt itself from liability created by the Federal Employers' Liability Act. (3) That the respondent Pacific Fruit Express Company was not a common carrier by railroad in interstate commerce, and (4) that the violation of the safety rule in directing petitioner to service burners in cars without help was, as

matter of law, not a proximate cause of injuries to petitioner. Petitioner contends that in reaching the result that petitioner was not entitled to a jury trial, the trial court and the Utah Supreme Court disregarded the controlling principles of law pronounced by this Court in numerous cases.

In ruling as it did on the first ground the said courts refused to apply the principles contained in *Linstead v. Chesapeake & O. Ry. Co.*, 276 U. S. 28, 48 S. Ct. 241, 72 L. Ed. 453; *Denton v. Yazoo & M. V. R. Co.*, 284 U. S. 305, 52 S. Ct. 141, 76 L. Ed. 310; *Standard Oil Co. v. Anderson*, 212 U. S. 215, 29 S. Ct. 252, 53 L. Ed. 480.

By its ruling on ground two above set forth the said trial court and Utah Supreme Court disregarded and refused to follow the express language of *Section* 55 of 45 *U.S.C.A.*, and *Philadelphia, B. & W. R. Co. v. Schubert*, 224 U.S. 603, 32 S. Ct. 589, 56 L. Ed. 911.

In sustaining the trial court on ground three the Utah Supreme Court refused to give effect to the provisions of the Federal Employers' Liability Act, 45 *U.S.C.A., Section* 51, et seq.

In ruling as it did on ground four the Utah Supreme Court disregarded and refused to follow many controlling decisions of this Court. By such ruling the Utah Supreme Court denied to petitioner his right of trial by jury not only on this ground but also on the other three grounds indicated. Such ruling is contrary to the following cases decided by this Court: *Coray v. Southern Pacific Co.*, 335 U.S. 520, 69 S. Ct. 275, 93 L. Ed. 208; *Wilkerson v. McCarthy*, 336 U.S. 53, 69 S. Ct. 413, 93 L. Ed. 497; *Pauly v. McCarthy*, 330 U.S. 802, 67 S. Ct. 962, 91 L. Ed. 1261; *Lavender v. Kurn*, 327 U. S. 645, 66 S. Ct. 740,

90 L. Ed. 916; *Bailey v. Central Vermont Ry. Co.*, 319 U.S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444; *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 63 S. Ct. 444, 87 L. Ed. 610; *Tiller v. Atlantic Coast Line R. Co.*, 323 U.S. 574, 65 S. Ct. 421, 89 L. Ed. 465; *Tennant v. Peoria & Pekin Union R. Co.*, 321 U.S. 29, 64 S. Ct. 409, 88 L. Ed. 520; *Ellis v. Union Pac. R. Co.* 329 U.S. 649, 67 S. Ct. 598, 91 L. Ed. 572.

In the cases above cited this Court has held that questions such as those decided here by the Utah courts as matters of law are for the jury, and that the refusal of trial courts to submit such issues constitutes an abdication of the court's sworn duty to guard and protect the right of litigants suing under the Federal Employers' Liability Act to jury trial. To deprive railroad workers of the benefits of this right takes from them a goodly portion of the relief afforded by Congress.

Jurisdictional Statement

(a) Jurisdiction to grant this petition is sustained by *Section* 1257 (3), *Title* 28, *U.S.C.A.*

(b) The statutes of the United States applied by the Supreme Court of Utah are 45 *U.S.C.A., Sections* 51 to 59, known as the Federal Employers' Liability Act, material portions thereof being set forth in the appendix hereto.

(c) The judgment of the Supreme Court of Utah was rendered on June 29, 1950. It is set forth at R. 118-125. It is not yet reported in the official Utah Reports but appears at 219 P. 2d 1080. The petition for rehearing was denied September 28, 1950 (R. 126). This Petition for Certiorari was filed December 27, 1950.

Questions Presented

The Petitioner at the time of his injury was in the general employ of the respondent Pacific Fruit Express Company but was engaged in performing the work of the respondent Union Pacific Railroad Company under its direction in servicing cars in a live train being transported by respondent Union Pacific Railroad Company as a common carrier by rail. This was the only work performed by petitioner and he only worked on respondent Union Pacific Railroad Company's trains and no others. Negligence and proximate cause were present in that respondents failed to furnish petitioner a safe place to work in that poisonous gas was present in the cars and petitioner was directed to work alone and in a hurry to permit respondent Union Pacific Railroad Company's train to leave its yards at Laramie, Wyoming.

The Utah courts have denied to petitioner a jury trial and petitioner presents the following as questions to be decided by this Court:

1. Was petitioner an employee of respondent Union Pacific Railroad Company within the Federal Employers' Liability Act?

2. Can respondent Union Pacific Railroad Company by the device of using employees of a corporation owned by it and another common carrier to do its work avoid its liability under the Federal Employers' Liability Act to such employees in violation of 45 *U.S.C.A., Section* 55?

3. Was the respondent Pacific Fruit Express Company a common carrier by railroad within the meaning of the Federal Employers' Liability Act?

4. Were the respondents, or either of them, negligent in failing to furnish petitioner a safe place to work and directing him to work alone and in a hurry and was such negligence a proximate cause of petitioner's injuries?

The over-all important question presented here is whether, contrary to the intent and purpose of Congress in enacting the Federal Employers' Liability Act and contrary to controlling decisions of this Court, petitioner may be denied his right to a jury trial on the questions presented here.

Reasons Relied On for Allowance of Writ

The Supreme Court of Utah has decided Federal questions of substance and importance in ways not in accord with controlling decisions of this Court. Such Federal questions involve erroneous constructions and interpretations of the Federal Employers' Liability Act. The Utah Court erroneously answered the questions presented here and set forth in the preceding part of this Petition. In doing so the Utah Court affirmed a dismissal of petitioner's action brought under the Federal Employers' Liability Act where the evidence was clearly sufficient to supply an evidentiary basis for petitioner's cause. In refusing to permit petitioner's cause to be decided by a jury the Utah court has usurped the functions of the jury contrary to repeated admonitions of this Court and has wrongfully deprived petitioner of his right to a jury trial guaranteed by the United States Constitution.

It is essential that a writ be granted in order to determine important questions relating to the construction, interpretation and application of the Federal Employers' Liability Act. Of grave importance is the question of whether respondents have effectively shielded and insulated themselves

against liability to employees performing their work as common carriers by rail in interstate commerce by the device of separate corporations.

The Federal Circuit Courts have decided closely related questions in conflicting ways. These cases have caused and are causing confusion in the interpretation of the Federal Employers' Liability Act in determining what persons are entitled to the remedies afforded by that Act and in determining to what extent railroads may go in creating devices to shield and insulate themselves from liability to persons doing their work. See *Jones v. George F. Getty Oil Co.* 92 F. 2d 255 (10 C.C.A. — 1937); *McLamb v. E. I. DuPont De Nemours & Co.*, 79 F. 2d 966 (4 C.C.A. — 1935); *Harrell v. Atlas Portland Cement Co.*, 250 Fed. 83 (8 C.C.A. — 1918); *Cimorelli v. New York Cent. R. Co.*, 148 F. 2d 575 (6 C.C.A. — 1945); *Pennsylvania R. Co. v. Roth*, 163 F. 2d 161 (6 C.C.A. — 1947); *Pennsylvania R. Co. v. Barlion*, 172 F. 2d 710 (6 C.C.A. — 1949); *Gaulden v. Southern Pac. Co.*, 78 F. Supp. 651, affirmed 174 F. 2d 1022 (9 C.C.A. — 1949); *Jones v. New York Cent. R. Co., et al.*, 182 F. 2d 326 (6 C.C.A. — 1950).

A further reason for allowance of this Writ is to determine whether the Utah Supreme Court will be permitted to continue to deny jury trials to employees under the Federal Employers' Liability Act contrary to specific admonitions by this Court to the Utah Court. As examples see *Pauly v. McCarthy, et al.*, 109 Utah 398, 166 P. 2d 501, reversed and remanded 330 U.S. 802, 67 S. Ct. 962, 91 L. Ed. 1261; *Coray v. Southern Pacific Co.*, 112 Utah 166, 185 P. 2d 963, reversed and remanded 335 U.S. 520, 69 S. Ct. 275, 93 L. Ed. 208; *Wilkerson v. McCarthy*, 112 Utah 300, 187 P. 2d 188, reversed and remanded 336 U.S. 53, 69 S. Ct. 413, 93 L. Ed. 497.

Prayer

WHEREFORE, YOUR PETITIONER PRAYS that a Writ of Certiorari be issued out of and under the seal of this Court directed to the Supreme Court of the State of Utah commanding said Court to certify and send to this Court a transcript of the record in the case entitled Pete Moleton, Plaintiff and Appellant, v. Union Pacific Railroad Company, a corporation, and Pacific Fruit Express Company, a corporation, Defendants and Respondents, No. 7379, including also the proceedings in said Supreme Court to the end that said cause may be reviewed and determined by this Court and the judgment of the Utah Supreme Court reversed.

PETE MOLETON, PETITIONER,

By CALVIN W. RAWLINGS,
PARNELL BLACK,
Attorneys for Petitioner,
530 Judge Building,
Salt Lake City, Utah.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion of Courts Below

The trial court on the 23rd day of March, 1949, granted defendant's motion to dismiss petitioner's cause of action (R. 26), and judgment was entered thereon April 23, 1949 (R. 27). The opinion of the Supreme Court of Utah affirming said judgment is set forth at R. 118-125. It is not yet officially reported in the Utah reports but appears at 219 P. 2d 1080.

Grounds on Which Jurisdiction of Supreme Court of The United States is Invoked

The judgment of the Supreme Court of Utah was rendered June 29, 1950 (R. 125). Petition for Rehearing was denied on September 28, 1950 (R. 126). Petition for Writ of Certiorari was filed on December 27, 1950. The judgment of the Supreme Court of Utah is based on its application of the United States statutes, commonly called the Federal Employers' Liability Act, 45 *U.S.C.A., Sections* 51 to 59. The jurisdiction of the Supreme Court of the United States is invoked under *Section* 1257 (3), *Title* 28, *U.S.C.A.*

Statement of the Case

Petitioner, a general employee of the respondent Pacific Fruit Express Company, hereinafter called express company, was injured on November 22, 1945, at Laramie, Wyoming,

while engaged in the performance of the work of respondent Union Pacific Railroad Company, hereinafter called the railroad company.

Petitioner brought action against both the express company and the railroad company in the District of Salt Lake County, Utah. Petitioner's complaint contained three causes of action, each stating a distinct theory upon which petitioner claimed the right to recover. The first cause was based on the Federal Employers' Liability Act. The second was against the express company alone and was based upon two counts, i.e., (1) that the express company was operating a railroad within the State of Wyoming (which respondents denied), and (2) that the express company had failed to comply with Wyoming statutes relating to workmen's compensation, and hence by the provisions of those statutes he could bring a common law action (respondents successfully contended that the express company's business was interstate in character and therefore not subject to those statutes). The third cause was against the railroad company only on the theory that petitioner was injured by negligence of the railroad company and there was no employer-employee relation between petitioner and the railroad company (R. 1-15).

After petitioner had introduced his evidence and rested, respondents moved for a dismissal of petitioner's cause (R. 106-110) which was granted (R. 111). The effect of this ruling is that in this day and age petitioner is not afforded any type of workmen's compensation.

Judgment was thereupon entered by the court against petitioner (R. 27) without benefit of jury trial and the Utah Supreme Court affirmed (R. 125).

Petitioner at the time he was injured was working in the yards of the railroad company at Laramie, Wyoming. The railroad company owns all of the tracks in this yard and it is the only railroad which transports cars in or out of these yards (R. 83). Laramie is a terminal. All engines pulling trains into this yard are changed there (R. 97). Switching operations on the trains are there conducted (R. 97) and perishable produce and commodities are serviced by icing or regulating heaters and ventilators (R. 84).

Petitioner's duties required that he perform this latter servicing work (R. 30). He had been hired by the express company and was paid by that company (R. 64). He could be fired by that company (R. 65). Petitioner had worked for the express company for twenty years and at all times his duties had been to take care of the inspection and servicing of refrigerator cars. In the summertime he iced the cars and in the winter took care of the heaters (R. 31). However, his instructions or directions as to what work he was to do came from the railroad company (R. 94, See Exhibit "5", R. 115, 116). It was stipulated that a copy of this Exhibit "5" was furnished to the express company yard clerk upon the arrival there of the train here involved (R. 95, 96).

The directions and instructions to all persons in the general employment of both respondents were made in the same way. The conductor on railroad company's trains proceeding towards Laramie would have waybills on the cars and freight contained in the train. From these he would make up a switch list (Exhibit "5", R. 94, 95). In this switch list he would place the number of each, the name of the owner thereof, the class of freight, the contents of each car and its destination. The instructions therein also included the temperature at which

the cars containing perishable commodities were to be kept (R. 37, 87). This switch list was then left at a telegraph station of the railroad company and the contents relayed to the railroad company yard office (R. 94). Copies were there made by the railroad company and distributed to all persons who were to work on the train in the Laramie yard in order that they would be ready to go to work as soon as the train arrived (R. 94). In the case at bar a copy of Exhibit "5" was given not only to persons in the general employ of the railroad company but also to express company general employees (R. 95). The instructions were thus relayed to the express company foreman and he in turn relayed them to the men who were actually to do the servicing (R. 88). The express company had nothing to do with the time of arrival or departure of trains, the tracks on which they were to be placed, the amount of work to be done, or what work was to be done (R. 96).

One of the safety rules promulgated and posted in the yards provided (See Exhibit "4", Rule 19 d., R. 114):

> "When inspecting cars or lighting heaters at regular inspection points, not less than two employees must work together for each other's protection."

By stipulation it appears that the express company was a Utah corporation, organized in 1906, and with the exception of a relatively small number of shares its stock was owned in equal amounts by respondent, Union Pacific Railroad Company, and the Southern Pacific Company. Directors of these companies were not interlocking. The express company serviced cars for four railroads. However, at Laramie the

only work done by express company employees was in servicing trains of the respondent railroad company and no other company (R. 105, 106).

On the day that petitioner was injured he arrived at work at 8:00 in the morning. Shortly before noon a westbound train consisting of 50 or 60 cars pulled into the yards at Laramie on Track 10 (R. 46). Just before the train arrived petitioner and the foreman were the only men on duty. The foreman told petitioner to work on this train and that there were three refrigerator cars in which petitioner was to regulate the heaters by shutting them off (R. 47). Because petitioner would have to walk a half mile to the point where he was to perform his duties he started for Track 10 before the train arrived (R. 46). The foreman told petioner that the train was only supposed to stay five or six minutes in the yard and that he was only to open one of the plugs on each car (R. 79). Exhibits "1" and "3" (R. 112, 113) are pictures of the type of car upon which petitioner was to work. These cars are about 15 or 16 feet from the top of the rail to the top of the car (R. 31). From the floor to the ceiling is between 8 and 10 feet. The cars are 10 feet wide (R. 31). The cars have an ice bunker on each end about 3 feet to 3½ feet wide. The floors of these bunkers are made of tin or steel and the bunkers are separated from the rest of the car by either wood or steel partitions (R. 32, 33). To get into these bunkers the men climb a ladder on the side of the car to its top and open the door or plug of the bunkers. They then climb down the ladder on the inside of the bunkers to the floor where the heaters are located (R. 42). When petitioner arrived at the first car he climbed to the top and opened the plug. He then proceeded to the other two cars, opening the plug on each. He

then returned to the first car on which he had opened the plug. Petitioner estimated that it took about four minutes to perform the foregoing duties (R. 76). He climbed down into the bunker of the first two cars and shut off the heaters. He then entered the bunker of the third car. He estimated that the plug on this car had been open between ten and twelve minutes (R. 77). After he had shut off the heater he returned to the top of the car, put the plug in place, and he remembers nothing after that until he came to lying on the ground near the car from which he had fallen (R. 51, 63).

These burning heaters in the bunkers created and caused gas fumes within the bunkers (R. 85). It was stipulated by the parties that the gas created was carbon monoxide gas (R. 85). Many of the employees who worked on these cars suffered headaches and had a "bad feeling" after working on too many (R. 85). A person is affected by these gas fumes after he has been in the car and has come out into the fresh air. This gas does not have an odor and it cannot be seen (R. 86, 87).

The method used by petitioner in shutting off the heaters was not the safe way to perform this work. Plugs on both ends of the car should have been opened in order that there could be ventilation through the car. Petitioner did not use this safe way because the train was in a hurry and the foreman instructed him to open only one of the plugs on each car (R. 79). Petitioner observed that the rear-end plugs on at least two of the cars were sealed and he could not break the seals without authority (R. 89). This authority he did not have (R. 79).

It was stipulated that the car from which petitioner fell was F.D.E.X. 9084 (R. 55). This car appears to have been the second car from the head end of the train (R. 101). It was a car of the Fruit Growers' Express and not one belonging to the respondent express company (R. 33, 88, 112).

From this fall petitioner suffered severe injuries, the details of which have been eliminated from the printed record in this case for the reason that such testimony has no bearing upon the questions raised here.

Specification of Errors

The Supreme Court of Utah committed prejudicial and reversible error in affirming the trial court's judgment on the motion to dismiss petitioner's cause of action for the following reasons:

1. The Utah Supreme Court deprived petitioner of a jury trial in a case arising under the Federal Employers' Liability Act contrary to controlling cases decided by the Supreme Court of the United States.

2. The Utah Supreme Court committed error in holding that petitioner was not an employee of the respondent railroad company within the meaning of the Federal Employers' Liability Act.

3. The arrangement whereby respondent railroad company has employees of the respondent express company and not its own general employees perform necessary services on its interstate trains and cars is a device in violation of 45 U.S.C.A., Section 55.

4. The respondent express company at the time of petitioner's injuries was a common carrier by railroad in interstate commerce.

5. The evidence introduced by petitioner furnished an evidentiary basis to support a finding that the respondents, or either of them, were negligent and that such negligence proximately caused, in whole or in part, injuries to petitioner.

ARGUMENT

Point I.

The Utah Supreme Court deprived petitioner of a jury trial in a case arising under the Federal Employers' Liability Act contrary to controlling cases decided by the Supreme Court of the United States.

Under recent decisions of this Court it has become firmly established law that the jury is the tribunal selected by Congress under the Federal Employers' Liability Act to decide the factual issues presented in cases brought under that Act.

This Court in the case of *Wilkerson v. McCarthy*, 336 U.S. 53, 69 S. Ct. 413, 93 L. Ed. 497, has aptly described the philosophy with which the Supreme Court of Utah has again approached the construction of this federal act. The Utah Supreme Court's interpretation of this Act is permeated "by a hostile philosophy."

In describing the proper approach in deciding a case under this Act this Court in *Lavender v. Kurn*, 327 U.S. 645, 66 S. Ct. 740, 744, 90 L. Ed. 916, stated:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are

> in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

In *Tenant v. Peoria & Pekin Union R. Co.*, 321 U.S. 29, 64 S. Ct. 409, 412, 88 L. Ed. 520, this Court stated:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion, drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of the witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable."

In *Bailey v. Central Vermont Ry. Co.*, 319 U.S. 350, 63 S. Ct. 1062, 1064, 87 L. Ed. 1444, this Court stated:

> "The right to trial by jury is 'a basic and fundamental feature of our system of federal jurisprudence.' Jacob v. New York City, 315 U.S. 752, 62 S. Ct. 854, 86 L. Ed. 1166. It is part and parcel of the remedy af-

> forded railroad workers under the Employers' Liability Act. Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries. That method of determining the liability of the carriers and of placing on them the cost of these industrial accidents may be crude, archaic, and expensive as compared with the more modern systems of workmen's compensation. But however inefficient and backward it may be, it is the system which Congress has provided. *To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them.*"
>
> * * * *
>
> "* * * all these were facts and circumstances for the jury to weigh and appraise in determining whether respondent in furnishing Bailey with that particular place in which to perform the task was negligent. The debatable quality of that issue, the fact that fair-minded men might reach different conclusions, emphasize the appropriateness of leaving the question to the jury. The jury is the tribunal under our legal system to decide that type of issue, * * * as well as issues involving controverted evidence. * * * To withdraw such a question from the jury is to usurp its functions."

Other cases of similar import are cited on page ..... of the petition for Writ of Certiorari.

Point II.

The Utah Supreme Court committed error in holding that petitioner was not an employee of the respondent railroad company within the meaning of the Federal Employers' Liability Act.

The important question here is whose work was being done by the petitioner at the time of his injuries. This Court has

held that this is the factor that determines the existence of the relationship of employer-employee. In *Standard Oil Co. v. Anderson,* 212 U.S. 215, 29 S. Ct. 252, 254, 53 L. Ed. 480, this Court stated:

> "* * * To determine whether a given case falls within the one class or the other we must inquire whose is the work being performed, — a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work. Here we must carefully distinguish between authoritative direction and control, and mere suggestion as to details or the necessary cooperation, where the work furnished is part of a larger undertaking."

This quotation was quoted with approval and followed in *Linstead v. Chesapeake & O. Ry. Co.,* 276 U.S. 28, 48 S. Ct. 241, 242, 72 L. Ed. 453, a Federal Employers' Liability Act case.

In the case at bar who had authoritative direction and control of petitioner's work as distinguished from suggestion as to details?

The railroad company was the one transporting the freight, perishable and otherwise, pursuant to contracts with shippers. The waybills were in the possession of the railroad company through its conductor. The requirement was that perishable commodities be handled and serviced in accordance with shipping instructions of the railroad company. These instructions were forwarded to the yard office of the railroad company prior to the arrival of the train. These instructions (Exhibit 5) were given to the general employers of the express com-

pany who were to service the refrigerator cars in accordance therewith. That exhibit is designated:

"SWITCH LIST AND
SERVICE INSTRUCTIONS
PERISHABLE FREIGHT"

The word "Instructions" is a commonly used word. It means that which is given by way of direction or command. The balance of Exhibit "5" confirms this meaning. In the upper right-hand corner it is addressed "*To Agent or Inspector.*" It is not addressed to the express company but to the person who is actually to do the work. It then states:

> "Carload Perishable Freight must be serviced in accordance with waybill instructions shown below."

This is a direction and a command. The use of the word "must" is significant and is addressed to the employees who are to service the cars on the railroad company's trains. Further direction and command is given to such employees by the following:

> "Position of ventilators is to be recorded under 'Arrival' and 'Departure' columns, show 'O' for Open, 'C' for Closed."

Turning to the second page of Exhibit "5" (R. 113) and to the 2nd, 6th and 7th cars, we find the following:

> "47 CPS Htr 35° above
> 47 — — 35° —
> 60 SPS Lt Htrs 15 Ext 20°"

These instructions were interpreted to mean that under the conditions at Laramie the heaters in these cars were to be extinguished, and that is exactly what petitioner was doing when injured.

This same Exhibit "5" was given to general employees of the railroad company instructing them in the duties they were to perform on the railroad company's interstate train.

As suggested by the foregoing quotation the work being performed by petitioner was a part of a larger undertaking, i.e., that of preparing the railroad's train for its further interstate journey for the transportation of freight contracted to be transported by the railroad company and not by the express company. Some employees changed engines, others performed the necessary switching operations, all in furtherance of said larger undertaking of which petitioner's work was only a small part.

The necessity of speed in the performance of petitioner's work was dictated by the railroad company. Where in the yards petitioner would perform his duty was controlled by the railroad company. It directed on what cars he would work, what work he would do and when he would do it.

This evidence and the inferences therefrom demonstrate that authoritative direction and control of petitioner's work rested with the railroad company, and its work was that which petitioner was performing when injured.

The Utah Supreme Court concluded that petitioner was not doing railroad company's work and that company did not control or direct his work because Exhibit "5" only gave information to the express company. That exhibit is addressed to the person who is to do the work, not the express company. The language therein and above quoted is the form of direction. This document was also given to railroad general employees. Did it merely give to them information, or was it a

direction controlling them in the performance of their duties? We submit that the Utah Court was clearly wrong in its interpretation of this document.

The Utah Court relied upon *Gaulden v. Southern Pacific Co.*, 78 F. Supp. 651, 656, (Affirmed 174 F. 2d 1022, 9 C.C.A.—1949). In that case plaintiff brought suit under the Federal Employers' Liability Act against the Southern Pacific Company and the Pacific Fruit Express Company. He was employed as an iceman in the ice yard and plant owned and operated by the express company at Bakersfield, California. Service was provided from that plant to the defendant Southern Pacific Company and to two other common carriers. Plaintiff and fellow employees were engaged in unloading ice from a refrigeration car belonging to the express company. While he was aiding in moving an empty car from the loading platform by means of a cable and winch he was injured. It could not be determined whether this car or the ice unloaded would be used by the Southern Pacific Company or the other two carriers. The court expressly pointed out that there was nothing to indicate that the activities pursued by plaintiff related to the work of the Southern Pacific Company and stated:

> "* * * It (the express company) also served the Atchison, Topeka and Santa Fe Ry. and the Sunset Railway. The eventual destination of the ice which plaintiff was helping to unload at the time of his injury was neither known or foreseen at the time. Thus nothing in the record indicates that the plaintiff was injured while employed in the service of his master's master."

In the case at bar petitioner was not performing services in the express company's ice yards or ice house. He was per-

forming services in the yards and on the tracks and cars of the respondent railroad company. The respondent railroad company was the only one involved and petitioner's services were in furtherance of the respondent railroad company's undertaking to transport freight. The *Gaulden* case is clearly distinguishable.

We submit that the case of *Linstead v. Chesapeake & O. Ry. Co.*, supra, is controlling here. The problem there was the same as in the problem in the case at bar, that is, whether the workman involved was an employee of the defendant within the meaning of the Federal Employers' Liability Act. Plaintiff was in the general employment of another railroad company and not the defendant. A judgment for plaintiff was upheld after it had been reversed by the Circuit Court.

In that case plaintiff's decedent was employed as a freight conductor by a railroad known as the "Big Four." He and the other members of his crew were paid by that company and they were not subject to discharge by the defendant company. The Big Four and the defendant were connecting carriers. The tracks of the Big Four were west of Cincinnati and the defendant's tracks were east. On interchange traffic the Big Four would send an engine and its crew to the defendant's yard and transport freight cars over defendant's tracks to the tracks of the Big Four. The Big Four trains while on defendant's tracks were under the supervision of defendant's trainmaster, and the crew observed the signals of defendant's switchtender and complied with the defendant's operating rules. While on such tracks and while transporting cars a passenger train of the defendant company collided with the rear end of the freight train, killing plaintiff's decedent. The trial court instructed the jury as matter of law

that said decedent was in the employ of the defendant company within the meaning of the Federal Employers' Liability Act. The court prefaced its discussion of the problem by stating at page 242:

> "* * The legal consequences of the relation between one in the general service of another who is in the special service of a third person are set forth in the case of Standard Oil Co. v. Anderson, 212 U.S. 215, 221, 29 S. Ct. 252, 53 L. Ed. 480."

The court then quoted with approval the quotation from the Standard Oil Company case quoted supra. The court also stated at page 243:

> "Now the work which was being done here by Linstead and his crew was the work of the Chesapeake & Ohio Railway. It was the transportation of cars, loaded and empty, on the Chesapeake & Ohio Railway between Stevens and Cincinnati. It was work for which the Chesapeake & Ohio road was paid according to the tariff approved by the Interstate Commerce Commission; it was work done under the rules adopted by the Chesapeake & Ohio Railway Company; and it was done under the immediate supervision and direction of the trainmaster in charge of the trains running from Stevens to Cincinnati, and that trainmaster was a superior employee of the Chesapeake & Ohio road. We do not think that the fact that the Big Four road paid the wages of Linstead and his crew, or that they could only be discharged or suspended by the Big Four, prevented their being the servants of the Chesapeake & Ohio Company for the performance of this particular job."

The strength of this case as authority in favor of the petitioner in the case at bar is emphasized by consideration of the case of *Hull v. Philadelphia & Reading Ry. Co.*, 252 U.S. 475, 40 S. Ct. 358, 64 L. Ed. 670. In that case the deceased was

in the employ of the Western Maryland Railroad Company as a brakeman. At the time he was killed he was a member of a crew engaged in transporting cars over the tracks of the defendant company, and he was subject to the operating rules of the defendant. The court held he was not an employee of the defendant. The court based its opinion upon the fact that it was the work of the general employer that was being accomplished by deceased at the time and that control as to details of work was not decisive. The court laid emphasis upon the answer to the question "whose work was being done."

In the case of *Jones v. George F. Getty Oil Co.*, 92 F. 2d 255 (10 C.C.A. — 1937) is found an excellent discussion of the foregoing cases as well as other federal cases concerning the problem presented in this case. In that case the court held that the plaintiff was an employee of the defendant, which company was not the general employer of plaintiff. After discussing the foregoing cases the court concluded at 263:

> "The ultimate test is: Whose is the work being done? Standard Oil Company v. Anderson, supra. In determining whose work is being done, the question of the power to control the work is of great importance (Standard Oil Company v. Anderson, supra), but is not conclusive (Linstead v. C. & O. R. Co.; Hull v. Philadelphia & R. R. Co. supra). The identity of the person who, in fact, directs the details of the work and gives the immediate instructions to the workmen is of comparatively small importance the power of control referred to being the power to control the undertaking as a whole. McLamb v. DuPont Company, supra; Singer Mfg. Co. v. Rahr, supra."

In applying the *Linstead* authority the court stated at page 260:

> "* * * There, as here, the injured person was under the general employ of another and was merely temporarily doing the work of the defendant. There, as here, the work so being done was primarily for the purpose of benefitting the general employer. There, as here, no payment to the general employer was made or contemplated for the doing of the work in question by its employees, and no payment of wages to the loaned employee was made or contemplated by the company whose work he was doing. There, as here, however, the work in which the employee was engaged at the time of the injury was a part of the defendant's regular business. The general power of control and supervision of the work was in the defendant, although the injured employee was under the immediate supervision of the general employer and was only subject to being discharged by his general employer."

The court also compared the *Linstead* and *Hull* cases, supra, and at page 261 concluded as follows:

> "* * * The determining factor, therefore, is not the question of control over the employee, for that was the same in both cases, but as stated in Standard Oil Company v. Anderson, supra, it is a question of whose work was being done. In the Hull case the plaintiff's intestate was operating a train of his general employer, pursuant to his general employer's obligations with its shippers. It was, therefore, his general employer's work which was being done and he was held to remain that company's employee. In the Linstead case the plaintiff's interstate, a general employee of the Big Four Railroad, was carrying on an operation which the C. & O. Company had undertaken to perform. The work he was performing was therefore the work of the C. & O. and the court held that in so doing he became that company's special employee."

In *Denton v. Yazoo & M. V. R. Co.*, 284 U.S. 305, 52 S. Ct. 141, 76 L. Ed. 310, this Court, in a case similar to the one at bar, held that the employee was an employee not of the one hiring him and paying his wages but of the United States Government for whom he was performing services at the time of his negligence.

Three recent cases decided by the Sixth Circuit Court of Appeals unhold the contentions of petitioner here and demonstrate the error committed by the Utah Supreme Court in holding as matter of law that petitioner could not be considered an employee of the defendant railroad company. These cases are: *Cimorelli v. New York Cent. R. Co.*, 148 F. 2d 575; *Pennsylvania R. Co. v. Roth*, 163 F. 2d 161; *Pennsylvania R. Co. v. Barlion*, 172 F. 2d 710. Each of these cases was brought under the Federal Employers' Liability Act. In each case the injured person had been employed by a contractor who was to perform certain unloading and reloading services on the cars of the defendant railroad companies. In each instance the railroad company had entered into a contract with the United States Government, agreeing to maintain and operate in its yards a temporary storage place for war material. The unloading and reloading was hired out by the railroad company to contractors. In each case the plaintiff was employed by the contractor and was injured while performing the work agreed to be done by the contractor. In each case the court held that since it was the work of the defendant railroad company which was being performed that the plaintiffs could maintain their actions under the Federal Employers' Liability Act. The language and the opinion of each of these authorities support petitioner here. We will quote only from the conclusion given in the *Barlion* case,

the latest of the three cases. In referring to the two previous cases, at page 712, the court pointed out the facts which were of controlling importance, and referring in particular to the *Cimorelli* case stated:

> "* * * that the court, in its over-all estimate of the controlling facts in the latter case, pointed out that the employment of the contractor was general, that the number of cars to be unloaded or reloaded depended upon the demands of the business, that the work was to be done when, where, and in the proportions as the needs of the railroad company might justify, that the railroad company controlled the place where the work was to be performed and in which there was a frequent movement of cars, and that no part of the premises was surrendered to the contractor. It was further said that the whole project involved many interdependent details, the control or any one of which could not be surrendered without disorganization of the whole, and that, from the nature of the work, its performance could not be committed exclusively by the railroad to the contractor engaged in doing the unloading and reloading work and rendering the other services in question. The railroad had this right of control in the instant case to the same extent as it did in the Roth case; and it is the right of control, rather than its exercise, that determines whether or not a contractor is an independent contractor. The Roth case, therefore, cannot be distinguished on the ground that the control of the railroad company was there exercised, whereas it was not exercised in the present case."

In the case at bar the number of cars to be inspected and heaters regulated depended upon the demands of the railroad company's business; the work to be done by plaintiff and other express company employees was to be done where, when and in the proportions as the needs of the railroad company might justify. The railroad company controlled the place

where the work was to be performed, and no part of these premises had been surrendered to the express company. In the case at bar the whole project was readying trains in the yards of the railroad company for further interstate movement and involved many independent details such as the switching and servicing of the cars. The speed with which the work had to be done in order that the trains could be put into movement was dictated by the railroad company. The railroad company in the case at bar not only had the right to supervise the work being done by petitioner but actually directed petitioner, as evidenced by Exhibit "5". These facts unerringly point to the proposition that petitioner at the time he was injured was a special employee of the defendant under the Federal Employers' Liability Act and was performing the work of the respondent railroad company.

We submit that the Supreme Court of Utah committed grievous and prejudicial error in ruling contrary to the foregoing controlling authorities from this Court and other Federal Courts.

Point III.

The arrangement whereby respondent railroad company has employees of the respondent express company and not its own general employees perform necessary services on its interstate trains and cars is a device in violation of 45 U.S.C.A., Section 55.

The Supreme Court of the State of Utah committed error in holding that the arrangement whereby the respondent railroad company had its work performed by employees of the

express company was not a device in violation of 45 *U.S.C.A., Section* 55. That section of the Federal Employers' Liability Act, in so far as material here, provides:

> "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void."

The only reason given by the Utah Court for this result was the one advanced in *Gaulden v. Southern Pac. Co.,* 78 F. Supp. 651, wherein that District Court held the creation of the express company occurred before the Federal Employers' Liability Act was enacted and, hence, there could be no basis for a charge that the creation of the Pacific Fruit Express Company violated said section. It is to be noted that the statute is not leveled against the creation of such a device but it outlaws such device regardless of when created. This reason has been eliminated by this Court in *Philadelphia B. & W. R. Co. v. Schubert,* 224 U.S. 603, 32 S. Ct. 589, at 592, 56 L. Ed. 911, wherein this Court stated:

> "* * * that the provisions of Sec. 5 (this section) were intended to apply as well to existing as to future contracts and regulations of the described character cannot be doubted. The words, 'the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act,' do not refer simply to an actual intent of the parties to circumvent the statute. The 'purpose or intent' of the contracts and regulations, within the meaning of the section, is to be found in their necessary operation and effect in defeating the liability which the statute was designed to enforce. Only by such general application could the statute accomplish the object which it is plain that Congress had in view.

> "Nor can the further contention be sustained that, if so construed, the section is invalid. The power of Congress, in its regulation of interstate commerce and of commerce in the District of Columbia and in the territories, to impose this liability, was not fettered by the necessity of maintaining existing arrangements and stipulations which would conflict with the execution of its policy. To subordinate the exercise of the federal authority to the continuing operation of previous contracts, would be to place, to this extent, the regulation of interstate commerce in the hands of private individuals and to withdraw from the control of Congress so much of the field as they might choose by prophetic discernment to bring within the range of their agreements. The Constitution recognizes no such limitation. It is of the essence of the delegated power of regulation that, within its sphere, Congress should be able to establish uniform rules, immediately obligatory, which as to future action should transcend all inconsistent provisions. Prior arrangements were necessarily subject to this paramount authority."

It is clear from this language that the respondents here cannot, by their conduct, prevent Congress from eliminating devices which result in avoiding liability under the Federal Employers' Liability Act. If any such device or arrangement is approved by this Court, then a simple avenue of escape from liability under the Act has been provided railroad companies. A switching corporation could be formed, the employees of which would perform all of the necessary switching operations on interstate trains of the defendant railroad company at Laramie. The switch list would be furnished these employees, and from the "information" or instructions therein contained they could perform all of the necessary switching to be done on these trains. These employees would

not be afforded the remedies provided by the Federal Employers' Liability Act if the reasoning of the Utah Court is to be upheld.

If the imagination of the officials of the railroad company could devise enough companies to cover the operations necessary to conduct its business, it would soon be freed of all liability under this Act. If it may eliminate as employees persons who service and regulate refrigerator cars in its interstate trains, then it may, by a parity of reasoning, eliminate switchmen, brakemen, enginemen, car repairmen, etc.

We submit that the opinion of the Utah Court is contrary to the foregoing controlling authority from this Court and that to uphold that court in its opinion would effectively establish a serious inroad upon coverage of the F. E. L. A.

Point IV.

The respondent express company at the time of petitioner's injuries was a common carrier by railroad in interstate commerce.

We readily acknowledge that there is a dearth of authority supporting the contention of petitioner under this point. However, even if this Court should agree with the Utah Supreme Court that the express company was not a common carrier by rail in interstate commerce, nevertheless, the liability of the respondent railroad company would not be eliminated from this case.

In *Wells Fargo & Co. v. Taylor,* 254 U. S. 175, 41 S. Ct. 93, 65 L. Ed. 205, this Court held that an express company was not a common carrier by railroad because in the ordinary acceptation of the words, an express company was not a

railroad in the sense of owning engines, tracks, etc. In the case at bar the express company furnishes an essential and integral part of the transportation offered by the railroad company in the conduct of its business. The transportation of perishable goods and commodities has become a standard part of railroad transportation. The large express companies furnish the facilities to the railroads to enable them to transport this type of freight. By so doing, the express companies have become part and parcel of the railroad business. These large express companies are owned by railroad companies. In the case at bar the Pacific Fruit Express Company is owned by the respondent Union Pacific Railroad Company and the Southern Pacific Company.

Under the ruling of the Utah courts petitioner has been entirely eliminated from any type of compensation. He is not entitled to compensation under the Wyoming statutes affording compensation to employees of intrastate railroads because the express company is not a railroad according to the holding of the trial court. Of course, if the express company were to be considered a railroad company, he would not come within the Act because the business of the company is almost entirely interstate. Petitioner does not come within the other provisions of the Wyoming Compensation Statute because those statutes eliminate therefrom employees engaged in interstate commerce.

We submit that looking at this problem from a realistic viewpoint these employees of the express company are engaged in railroad work the same as persons in the general employ of the railroad company itself. Their services are a necessary part of the work of the railroad. We believe that this Court should review the question of whether or not these

express companies are so much a part of railroading in this country that their employees should be afforded the remedies of the Federal Employers' Liability Act. We submit that for all practical purposes they are railroad employees, and this fact should be judicially recognized.

Point V.

The evidence introduced by petitioner furnished an evidentiary basis to support a finding that the respondents, or each of them, were negligent and that such negligence proximately caused, in whole or in part, injuries to petitioner.

The Supreme Court of the State of Utah, in our opinion, gave only cursory consideration to the questions of negligence and proximate causation. The Utah Court set out the four grounds of negligence relied upon by petitioner as follows:

> "(a) a failure to furnish plaintiff a safe place to work; (b) failure to provide any means of removing the obnoxious carbon monoxide fumes; (c) ordered plaintiff to service and adjust the charcoal burners without help or assistance from any other employee; (d) allowing gas to so accumulate."

Only grounds (b) and (c) were considered by the court. In discussing ground (b) the court stated:

> "* * * There was a safe means of working in the manner plaintiff attempted; but he failed to carry it out. A means of cleaning the bunkers of obnoxious gas was available, had plaintiff properly applied it."

The evidence in this case established that the petitioner was told that the train was to leave within five or six minutes and that it was necessary for him to perform his duties in

regulating the heaters quickly. He was told by his foreman to only open one plug on each of the cars. Such a direction from the foreman of necessity eliminated the method of ventilating mentioned by the court. The method required by the exigencies of the occasion was not an adequate means of removing the gas fumes. Hence, we submit that this ground of negligence was sustained under the proof in this case.

The court conceded that negligence under ground (c) was established in that the rules were disobeyed in requiring petitioner to work alone. The court, however, held as matter of law there was no proof of proximate cause. In discussing this the court stated:

> "* * * But there is no question that the rules were disobeyed in sending plaintiff upon this duty without assistance. However, there is no explanation present in the case of how the situation would have been different and the injury not suffered had he been assisted by another employee. The result is that there is a link missing in plaintiff's efforts to connect the negligence mentioned in (c) with the resultant fall and injury."

We submit that there was an evidentiary basis which would support a finding that this negligence proximately caused, in whole or in part, injuries to petitioner. Since he was alone, it was necessary for him to enter all three bunkers and no one was present to assist him in the performance of any of his duties. He was thereby subjected to the carbon monoxide gas which had accumulated in the three bunkers in which the heaters had been burning. If another employee had been present, petitioner would have been relieved of the necessity of subjecting himself to the fumes of all three bunkers. Also, had two men been present, they would have had time to prop-

erly ventilate the cars by removal of the two plugs on each car. Certainly, from this factual situation the jury could have reasonably found that the lack of assistance proximately contributed to petitioner's injuries in that he either would not have been subjected to as much gas as he in fact was, or that the cars could have been properly ventilated and the gas would not have had the effect which it did.

The matter of proximate cause has usually been considered to be peculiarly within the province of the jury. *Coray v. Southern Pacific Co.*, 335 U. S. 520, 69 S. Ct. 275, 93 L. Ed. 208; *Lavender v. Kurn*, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916; *Tiller v. Atlantic Coast Line R. Co.*, 323 U. S. 574, 65 S. Ct. 421, 89 L. Ed. 465; *Tennant v. Peoria & P. U. R. Co.*, 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520. See also the excellent discussion on this subject contained in *Eglsaer v. Scandrett*, 151 F. 2d 562.

In the *Coray* case the concept of proximate cause expressed by the Utah Supreme Court was criticized. This Court stated at 335 U. S. at page 524:

> "The language selected by Congress to fix liability in cases of this kind is simple and direct. Consideration of its meaning by the introduction of dialectical subtleties can serve no useful interpretative purpose. The statute declares that railroads shall be responsible for their employees' deaths 'resulting in whole or in part' from defective appliances such as were here maintained. * * * Congress has thus for its own reasons imposed extraordinary safety obligations upon railroads and has commanded that if a breach of these obligations contributes in part to an employee's death, the railroad must pay damages."

This Court has also recognized that there is always some speculation in arriving at ultimate facts in cases arising under the Federal Employers' Liability Act. See the *Kurn* case, supra.

We submit that the Utah Supreme Court in holding that petitioner should be deprived of a jury trial on the question of proximate causation has disregarded the plain intent and purpose of Congress and also the controlling authorities decided by this Court.

CONCLUSION

The problem that is presented by this Petition for Writ of Certiorari is a problem of great importance to persons performing work on interstate trains. We believe that the Utah Supreme Court has decided the questions here involved contrary to controlling cases announced by this Court and also cases decided by Federal Circuit Courts. The distinguishable *Gaulden v. Southern Pacific Company*, 78 F. Supp. 651, has apparently caused confusion in this field.

We respectfully submit that this Court should grant this petition in order that it could announce a definite rule to be followed by the courts administering the Federal Employers' Liability Act. We believe that the importance of the problem and the serious error committed by the Utah Supreme Court justifies us in requesting and this Court in granting a Writ of Certiorari.

Respectfully submitted,

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APPENDIX "A"

Section 51, Title 45, U.S.C.A.:

> "Every common carrier by railroad while engaging in commerce between any of the several States * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its * * * works, * * *."

Section 55, Title 45, U.S.C.A.:

> "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: * * *."

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 465

PETE MOLETON,

Petitioner,

vs.

UNION PACIFIC RAILROAD COMPANY, a corporation, and PACIFIC FRUIT EXPRESS COMPANY, a corporation,

Respondents.

BRIEF OF RESPONDENTS OPPOSING PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 468

PETE MOLETON,

Petitioner,

VS.

UNION PACIFIC RAILROAD COMPANY, a corporation, and PACIFIC FRUIT EXPRESS COMPANY, a corporation,

Respondents.

BRIEF OF RESPONDENTS OPPOSING PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner's statement of this case set forth in his brief is argumentative and incomplete. The opinion of the Supreme Court of Utah more fairly presents the facts disclosed by the record. We refer the Court to that statement in lieu of stating the case ourselves (R. 118, 119, 120). Facts ignored by petitioner's statement, which are material to the argument herein contained, will be incorporated in such argument with appropriate reference to the record.

One further comment as to petitioner's statement of the case seems necessary. It is clear beyond dispute that the first cause of action of plaintiff's complaint alleged the only theory

of liability which was presented to the Supreme Court of Utah. Petitioner abandoned all theories of liability as contained in his second and third causes of action. In this connection the Supreme Court of Utah said:

> "In their brief counsel for plaintiff have this to say: 'However, on this appeal we are only interested in the first cause of action.' We shall limit our discussion to that cause. It is founded upon the idea that plaintiff in the performance of this duty was, in reality, performing the work of the railroad company and therefore his case should be decided under the Federal Employer's Liability Act" (R. 120).

The Supreme Court of Utah could not have erred in ruling on the liability of either defendant under the second or third causes of action of petitioner's complaint, because the Supreme Court of Utah was never called upon to consider either of these causes of action or the sufficiency of the evidence to warrant submission of plaintiff's case to a jury on the theories therein embodied.

ARGUMENT

POINT I.

Petitioner's Cause of Action, if any, against the Union Pacific Railroad Company is not Controlled by the Federal Employer's Liability Act.

Petitioner was not an employee of the Union Pacific Railroad Company at the time of his injury so that the Federal Employer's Liability Act does not govern his cause of action against that Company. Title 45, Section 51, U. S. C. A. provides, in so far as is material to these proceedings, as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several states

> * * * shall be liable in damages to any person suffering injury *while he is employed by such carrier* in such commerce * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier. * * *
>
> "*Any employee of a carrier*, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way, directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

The words chosen by Congress to define the industrial relationship which invokes the application of the Federal Employer's Liability Act are: "While he is employed by such carrier," and the further words "any employee of a carrier." Since the enactment of this statute the courts have uniformly refused to give an artificial meaning to the language used and have insisted that the words "employee" and "employed" were used in their natural and usual sense.

> *Robinson* v. *Baltimore & Ohio Railroad Co.*, 237 U. S. 84, 35 Sup. Ct. 491, 59 L. Ed. 849.
>
> *Hull* v. *Philadelphia & Reading Ry. Co.*, 252 U. S. 475, 40 Sup. Ct. 358, 64 L. Ed. 670.
>
> *Stevenson* v. *Lake Terminal Railroad Co.*, 42 Fed. 2d 357.
>
> *Reynolds* v. *Addison Miller Company, et al.*, 143 Wash. 271, 255 P. 110.

Petitioner's relationship to the Union Pacific Railroad Company must, therefore, be determined without imparting

to the words "employee" or "employed" as used in the Act any special or hidden meaning or significance.

The facts as shown by the evidence and as admitted in substance by petitioner's brief are as follows:

(1) Moleton was hired by the Pacific Fruit Express Company and worked solely for that same Company for a period of approximately twenty years (R. 30).

(2) Moleton's rate of pay was determined exclusively by the Pacific Fruit Express Company and his wages were paid solely by that Company (R. 64).

(3) Moleton worked under the direct supervision of employees of the Pacific Fruit Express Company with no supervision by any officer or employee of the Union Pacific Railroad Company (R. 64, 66).

(4) The methods used by Moleton and other employees of the Express Company for performing their work were governed by rules of that company as, for example, the safety rules mentioned in the evidence (R. 86, 114).

(5) Moleton acquired seniority rights with the Pacific Fruit Express Company by reason of his tenure in the job for which he was employed (R. 54, 55).

(6) The Pacific Fruit Express Company is an independent business engaged in performing services for various railroad carriers and has been in existence since the year 1906 (R. 105, 106).

(7) The only connection between Moleton and the Union Pacific Railroad Company consisted of the following: Moleton's employer, the Pacific Fruit Express Company, having undertaken to perform heating and refrigeration work on trains of this Railroad Company, the Railroad Company furnished to the Pacific Fruit Express Company information as to the work

which the Railroad Company desired the Express Company to perform (R. 91, 92).

These facts impel the conclusion that petitioner was an employee of the Pacific Fruit Express Company and that he was not an employee of the Union Pacific Railroad Company if the word "employee" is understood in its natural sense. Consequently, petitioner's cause of action against the Union Pacific Railroad Company, if any, is not controlled by the Federal Employer's Liability Act.

To expand the meaning of the words "employee" and "employed" as they appear in the statute to cover the relationship of Moleton to the Union Pacific Railroad Company plainly conflicts with the cases cited above. Moreover, this Court and other courts have consistently rejected contentions such as are now made by the petitioner where similar fact situations appeared.

Chicago, Rock Island & Pacific R. Co. v. *Bond, Adm. of Turner*, 240 U. S. 449, 36 Sup. Ct. 403, 60 L. Ed. 735.

Gaulden v. *Southern Pacific Co.*, 78 Fed. Supp. 651, Affirmed 174 F. 2d 1022.

Jones v. *New York Central R. Co.*, 182 F. 2d 326.

Docheney v. *Pennsylvania Railroad Company*, 60 F. 2d 808.

Pollock v. *Minneapolis & St. Louis R. R. Co.*, 40 S. D. 186, 166 N. W. 641.

Taylor v. *New York Central Railroad Co.*, 294 N. Y. 397, 62 N. E. 2d 777.

Petitioner relies upon the case of *Linstead* v. *Chesapeake & Ohio R. Co.*, 276 U. S. 28, 48 Sup. Ct. 241, 72 L. Ed. 453.

This case does not really support petitioner's position. In that case this Court said:

> " 'It sometimes happens that one wishes a certain work to be done for his benefit and neither has persons in his employ who can do it nor is willing to take such persons into his general service. He may then enter into an agreement with another. If that other furnishes him with men to do the work and places them under his exclusive control in the performance of it, those men became *pro hac vice* the servants of him to whom they are furnished. But, on the other hand, one may prefer to enter into an agreement with another that that other, for a consideration, shall himself perform the work through servants of his own selection, retaining the direction and control of them. In the first case, he to whom the workmen are furnished is responsible for their negligence in the conduct of the work, because the work is his work and they are for the time his workmen. In the second case, he who agrees to furnish the completed work through servants over whom he retains control is responsible for their negligence in the conduct of it, because, though it is done for the ultimate benefit of the other, it is still in its doing his own work. To determine whether a given case falls within the one class or the other we must inquire whose is the work being performed, a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work. Here we must carefully distinguish between authoritative direction and control, and mere suggestion as to details or the necessary cooperation, where the work furnished is part of a larger undertaking.' "

The facts disclosed in that case were that Linstead was working under the rules of the Chesapeake & Ohio Railway Company and under immediate supervision and direction of a trainmaster of the Chesapeake & Ohio Railway Company at the

time of his death. Consequently, the court held that Linstead was in fact an employee of the Chesapeake & Ohio Railway Company. That the result would have been otherwise in that case had the control and supervision of Linstead's work rested with the Big Four Railroad Company is shown by the last two sentences of the quotation above.

Petitioner contends that he was employed by the Railroad Company because he was doing the work of the Railroad Company. The *Linstead* case specifically states that the question as to whose is the work being performed is usually answered by ascertaining who has the power to control and direct the employees in the performance of their work. The evidence in the case at bar outlined above conclusively establishes that Moleton was an employee of the Pacific Fruit Express Company and not of the Railroad Company when examined in the light of the test indicated. We therefore submit that the Linstead case supports respondents' position and does not support the position of petitioner.

The fact situations presented in the Cimorelli, Roth and Barlion cases, relied upon by petitioner, are distinguishable from the facts in the case at bar in that the railroad companies who were the defendants in those cases exercised substantial control over the work of the plaintiffs. For example, in the Cimorelli case the railroad company defendant determined the amount of equipment and the number of employees to be furnished by the contractor and the defendant had the right to approve in advance every item of cost and the necessity for the purchase of every item of equipment, and also the amount of the salary or wages of every employee of the contractor. That this relationship between the railroad company and the contractor is dissimilar to the relationship

between the railroad company and the Pacific Fruit Express Company in the case at bar is obvious. Perhaps the distinction justified the conclusions reached in those three cases. No such situation is here presented.

Before concluding this portion of our brief we ask the court to note two further factors to be considered in determining whether or not petitioner was an employee of the railroad company. During the 40-year life of the Federal Employer's Liability Act Congress has seen fit to liberalize its benefits, but has not seen fit to extend the scope of the statute beyond railroading in its strict sense. In 1939 Congress amended the Federal Employer's Liability Act to broaden the coverage thereof to include those employees of railroad carriers whose work substantially affected interstate commerce. Congress did not see fit to enlarge the scope of that statute to cover employees of those industries allied with the railroad industry but historically separate therefrom. See the opinion in the *Gaulden* case, supra. It must be assumed upon familiar principles of statutory construction that Congress was aware of the interpretation placed upon the original Act by the Supreme Court of the United States in the *Robinson, Bond* and *Hull* cases, supra, and that Congress was satisfied with that interpretation.

We respectfully submit that it is for Congress, rather than for the courts, to broaden the scope of the Federal Employer's Liability Act to include employees of industries such as the Pacific Fruit Express Company, the Pullman Company and others similarly situated.

The second factor worthy of consideration is the extraneous effect of a decision by this Court that employees of the Pacific Fruit Express Company are in fact employees of

the railroad company for whom the Express Company may be doing work. It is uniformly held that the Federal Employer's Liability Act so fully covers the liability of interstate carriers for injuries to their employees as to eliminate the application of state workmen's compensation laws.

Michigan Cent. R. Co. v. *Vreeland*, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. 417.

New York Central R. R. Co. v. *Winfield*, 244 U. S. 147, 37 Sup. Ct. 546, 61 L. Ed. 1045.

Peters v. *Industrial Commission of Utah*, 74 Utah 140, 277 P. 408.

Consequently, a determination by this Court that an employee of the Pacific Fruit Express Company, such as Moleton, is in fact an employee of the Union Pacific Railroad Company must inevitably deprive employees of the Express Company or other companies doing similar work of the protection of workmen's compensation statutes enacted in the states where such employees work. We respectfully submit that this Court should take into account the impact upon the laws of workmen's compensation of a decision that petitioner was an employee of the Union Pacific Railroad Company. If Congress had desired an application of the F. E. L. A. to the claims of workmen injured while working for industries such as the Pacific Fruit Express Company, it could very easily have said so when it amended the Act in 1939. The fact that Congress did not change the wording of the Act by the 1939 amendment to include employees of such industries was perhaps attributable to congressional unwillingness to deprive such employees of the benefits of such state workmen's compensation acts. In any event, for this Court now to do so by enlarging the settled definition of employment under the F. E. L. A. to

include the relationship which Moleton bore to the Union Pacific Railroad Company is to regress to a method of handling employee claims which this Court has termed archaic.

POINT II.

Petitioner's Cause of Action, if any, against the Pacific Fruit Express Company is not Controlled by the Federal Employer's Liability Act.

The Pacific Fruit Express Company is not a common carrier by railroad so that the Federal Employer's Liability Act does not govern petitioner's cause of action against that Company. The language used by Congress to define those employers subject to suit by injured employees under the Federal Employer's Liability Act is as follows: "Every common carrier by railroad while engaging in commerce between any of the several states." Title 45, Sec. 51, U. S. C. A., quoted in substance supra. This Court and other courts have uniformly held that employers such as the Pacific Fruit Express Company are not common carriers by railroad and, consequently, are not subject to suit by their employees under the Federal Employer's Liability Act.

Wells Fargo & Co. v. *Taylor*, 254 U. S. 175, 41 Sup. Ct. 93, 65 L. Ed. 205;

Gaulden v. *Southern Pacific Co.*, supra;

Reynolds v. *Addison Miller Co.*, supra.

In the *Robinson* case cited above this Court held that the Pullman Company was not a common carrier by railroad within the meaning of the Act. In the case of *Jones* v. *New York Central R. R. Co.*, cited supra, the Sixth Circuit Court

of Appeals determined that the Railway Express Agency was not a common carrier by railroad within the meaning of the Act. All these opinions would seem to make it clear that only those employers who are actually engaged as common carriers in the operation of a railroad are subject to suit under the Federal Employer's Liability Act.

No evidence was offered by petitioner in the case at bar to show that the Express Company was a common carrier or that it operated a railroad. The fact is, and no evidence in the record is to the contrary, that the Pacific Fruit Express Company is not a common carrier and that it does not operate a railroad. The petitioner seems to recognize these facts in his brief on this petition for certiorari, but he persists in his contention that the petitioner should be permitted to sue the Pacific Fruit Express Company under the Act. If his argument be understood to mean that Congress has created a right of action against the Pacific Fruit Express Company by the language presently used in the Federal Employer's Liability Act, then the answer is that this Court and other courts have construed the language in a manner contrary to his contention. If petitioner's argument be understood to urge that the Pacific Fruit Express Company is not presently subject to suit under the Act, but that it should be because of the nature of the operation which it conducts and of its close association with the railroad industry, then the answer is that petitioner's suggestions are appropriate for congressional consideration but are inappropriately addressed to this Court. Any possible contention that the Federal Employer's Liability Act in its present form permits suit against an employer such as the Pacific Fruit Express Company was long since disposed of in the *Taylor* case, supra, where the identical argument now made by petitioner was rejected.

Petitioner is now requesting this court to overrule all previously decided cases on this subject and to read into the plain language of Congress a new meaning. Admitting there is no authority whatsoever in support of his request, petitioner asks this Court to engage in judicial legislation to afford him a cause of action which Congress has not created. Upon the justifiable assumption that Congress was aware of the judicial interpretation which had been placed upon the Act by the courts prior to 1939, and upon the undisputable fact that Congress did not change the language of the Act defining those employers subject thereto in the 1939 amendment, it would seem appropriate to conclude that Congress was satisfied with the interpretation given the statute by the courts and did not propose to enlarge the scope of the statute in that particular.

We respecfully submit that certiorari should not be granted to accomplish an amendment to the statute which Congress has not seen fit to make.

POINT III.

The Arrangement between the Union Pacific Railroad Company and the Pacific Fruit Express Company is not a Device Violative of 45 U. S. C. A., Sec. 55.

In so far as is material to this case, Title 45 U. S. C. A., Sec. 55, provides as follows:

> "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void."

Petitioner argues that the arrangement between the Railroad Company and the Express Company is a device in violation of this section. The substance of petitioner's contention is that a railroad company which employs an independent contractor to do work which the railroad company might do by its own employees has employed a device to avoid liability under the F. E. L. A. and that the arrangement is therefore null and void.

In the *Bond* case, cited supra, the exact argument now urged by this petitioner was considered by this Court and was rejected in the following language:

> "We do not think that the contract can be regarded as an evasion of Section 5 of the Employer's Liability Act, which provides 'that any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void * * *'
>
> "Turner was something more than a mere shoveler of coal under a superior's command. He was an independent employer of labor, conscious of his own power to direct and willing to assume the responsibility of direction and to be judged by its results. This is manifest from the contract under review and from the cooperage contract; it is also manifest from his contracts with the other companies to whose industries the railroad company's tracks extended. We certainly cannot say that he was incompetent to assume such relation and incur its consequences."

In the *Gaulden* case, cited supra, the federal courts rejected a similar contention, albeit on a different basis than was given by this Court. The New Jersey courts disposed of a contention identical with that of the petitioner with the same results, *Drago* v. *Central R. Co.*, 93 N. J. L. 176, 106 A. 803.

The power of Congress to invalidate by legislation pre-existing devices created by interstate carriers to avoid liability under the Act, as well as to invalidate those devices to avoid liability which might be created by such interstate carriers after the enactment of such legislation, is not to be doubted. *Philadelphia B. & W. R. Co.* v. *Schubert*, 224 U. S. 603, 32 Sup. Ct. 589, 56 L. Ed. 911. But the fact that Congress is empowered to invalidate such pre-existing devices does not in any way substantiate petitioner's contention that the employment of an independent contractor by a railroad company is such a device as is proscribed by Congress under Section 55 of the Act. The cases cited above demonstrate that the courts have always considered the legitimate employment of an independent contractor by a railroad to perform work for said railroad as lawful and as consistent with the provisions of Section 55 of the Act. Were it shown by the evidence that the Railroad Company was motivated by the intention of improperly avoiding liability under the Act when it engaged the services of the Pacific Fruit Express Company as an independent contractor, and that the arrangement was a mere subterfuge, the situation might be otherwise; but the engagement of the services of an independent contractor by a carrier for reasons entirely foreign to a scheme for avoiding responsibility under the F. E. L. A. has never been considered a device violative of Section 55 of the Act.

It would appear that counsel for petitioner have been unable to discover any case holding an arrangement similar to that between the Railroad Company and the Express Company to be in conflict with that section. Certainly they have cited no such case. We respectfully submit that petitioner's contention in this regard is obviously flimsy in nature and does not constitute an adequate basis for certiorari.

POINT IV.

The Evidence Introduced by Petitioner did not Furnish an Evidentiary Basis for a Judgment against the Defendants, even Assuming the Federal Employer's Liability Act to be Applicable.

If we are correct in the arguments hereinbefore set forth that petitioner's cause of action against the defendants, or either of them, is not controlled by the provisions of the Federal Employer's Liability Act, then certiorari should not be granted. In addition to these matters on which we believe our position to be correct, we here contend that the evidence in the case at bar was insufficient to support a jury verdict in favor of the plaintiff. We concede that the plaintiff introduced sufficient evidence to present a question for the jury as to the negligence of the Pacific Fruit Express Company, but we deny that there is any evidentiary basis in the record to justify the conclusion that petitioner's injuries were caused by any conduct of either defendant.

We do not here present any contention involving a peculiar legalistic meaning of the term "proximate cause." The point which we now wish to make is that the evidence fails to disclose that carbon monoxide poisoning was in fact a cause of plaintiff's injuries, either in whole or in part. We respectfully submit that all of plaintiff's theories of liability were pyramided upon the basic premise that carbon monoxide gas poisoning produced petitioner's fall and consequent injuries. Unless the evidence is sufficient that a jury might so find, petitioner failed in establishing any causal connection between the negligence alleged and the injuries complained of.

Examination of the record discloses no direct testimony of any sort to the effect that plaintiff suffered gas poisoning

at the time of the accident. If his case was sufficient to go to the jury on this question it could only be held sufficient on the theory that a jury might properly draw an inference that Moleton's fall was so caused. We are not unmindful of the decisions of this court in the Lavender and Tennant cases, cited in petitioner's brief, which hold that jurors must be permitted a certain amount of speculation and conjecture in choosing between what may seem to them the more reasonable of two conflicting inferences. But we do not understand that this Court has ever receded from the proposition which found expression in the case of *Atchison, Topeka & Santa Fe* v. *Toops*, 281 U. S. 351, 50 Sup. Ct. 281, 74 L. Ed. 896. There Mr. Justice Stone, speaking for the Court, stated that the only type of inference which a jury would be permitted to draw was a reasonable one. As we read the Lavender and Tennant cases, this Court has gone no further than to state that a jury must be permitted to choose between conflicting reasonable inferences; and to further state that it is of no consequence to a reviewing court whether the jury chose the more reasonable or the less reasonable of such inferences. But it still remains for a trial court or a reviewing court to decide whether or not, as between conflicting inferences, one is so unlikely as to be unreasonable. If it be a fact that an inference is unreasonable, then it should not properly be the basis for a verdict at the hands of a jury.

So in the case at bar if the inference of carbon monoxide poisoning as a contributing factor to petitioner's accident is so weak and unsubstantial as to be unreasonable, the trial court properly refused to permit the jury to draw the inference in support of a possible verdict for the plaintiff. We recognize that each case must be judged on its own facts and that the reasonableness of the inference to be drawn is dependent

thereon. It is therefore appropriate to examine the facts in the case at bar to the end that it be determined whether or not they support a reasonable inference that petitioner fell as a result of gas poisoning.

We state at the outset that no one can rule out with rigid certainty the bare possibility that petitioner's fall may have been caused by carbon monoxide poisoning. But the evidence on this subject is such that we believe an inference of such poisoning as a cause of the accident is weak, unsubstantial and unreliable, so that it could not properly be accepted by reasonable men and should not therefore be the subject of consideration by a jury. The following facts either shown by the evidence or within the judicial knowledge of this court lead to that conclusion:

(1) Carbon monoxide is lighter than air;

(2) The hatch in the top of the bunker of the car from which Moleton fell had been open for several minutes before Moleton entered the bunker (R. 61, 62, 77);

(3) Moleton himself had been in the open air for enough time after working in the bunkers of the first two cars which he reached on the day of the accident that any possible effects of gas in the bunkers of those cars should have been dissipated. This is demonstrated by the fact that FDEX9084, which was the second car from the west end of the train, was three car lengths removed from the nearest other heater cars in which the plaintiff worked on the day of the accident (R. 74, 75, 76, 77, 100, 116);

(4) Moleton was in the bunkers of the three cars a total of less than six minutes and in the bunker of FDEX9084 only a minute or two (R. 77);

(5) There is no evidence that sufficient carbon monoxide gas would remain in the bunkers under cir-

cumstances such as outlined above and made apparent by the evidence in this case to cause anyone difficulty.

(6) The symptoms of carbon monoxide poisoning were described by the lay witnesses, but Moleton experienced no such symptoms after leaving any of the bunkers on the day of the accident and, in fact, displayed no symptom of carbon monoxide poisoning whatsoever (R. 43, 54, 85, 86);

(7) There are numerous other possible explanations as to the cause of the accident; two which readily occur are as follows: (a) Moleton might have fainted from causes wholly dependent upon his own physical condition; (b) Moleton might have slipped and fallen without losing consciousness at all; and his recollections thereof may be lost due to the shock he sustained as a result of the fall. Such other possible explanations do not, of course, eliminate the possibility that carbon monoxide poisoning contributed to the fall and the consequent injuries; but these other possibilities must be taken into account in determining whether the inference of gas poisoning is, in fact, a reasonable inference;

(8) No medical evidence was offered by petitioner to demonstrate that he had ever displayed any symptoms of carbon monoxide poisoning. In fact, no medical evidence of any kind was offered by petitioner to support his theory as to how the accident happened or even to prove that the accident could have happened as the petitioner now claims by his brief that it did.

(9) Petitioner's own testimony expressly negatived the fact that he was overcome by carbon monoxide gas. In this connection he testified:

"Q. While you were working on these three cars there, could you tell whether there was any gas in the bunkers on either of the three before you fell?

"A. Well, I notice you got—I figure I open this three plugs, I figure this gas go out, you know.

"Q. Were you dizzy while you were working on either of the other two cars?

"A. No, I no been dizzy."

By Mr. Black:

"Q. Your answer was: No, you weren't dizzy on either of the other two?

"A. No.

"Q. Now, how did you feel when you came up out of the bunker of this third car?

"A. I feel just the same like I used to when I work. I feel good. So I get out third car.

"Q. While you were putting the plug in, how did you feel?

"A. I put it, I say I shut one off plug; after I have to bend little bit is when I shut this plug, I raise up and I remember nothing how I go" (R. 54).

The cases relied upon by petitioner as to this phase of the case at bar have made it plain that this Court is committed to the principle that even doubtful cases should be submitted to juries for determination. Nevertheless, we respectfully submit that careful examination of the evidence shows the inference that carbon monoxide poisoning contributed to petitioner's fall to be unreasonable and to be so unsubstantial and unlikely as to fall short of any standard of proof acceptable to the law. To attribute petitioner's fall to carbon monoxide gas poisoning is not to draw a reasonable inference, it is just plain guessing and it is an unreasonable guess at that.

CONCLUSION

In conclusion we respectfully submit that the Supreme Court of Utah correctly decided that petitioner's cause of action against the defendants was not controlled by the Federal Employer's Liability Act and that even if it was he had failed to present a proper case for submission to a jury under that Act. We respectfully submit that the conflict alleged by petitioner to exist in the opinions of the various Circuit Courts of Appeal is nonexistent and that the different results reached in the different cases are easily explainable on the facts of such cases. We respectfully submit that this Court should not grant certiorari to create for petitioner a cause of action which Congress has not seen fit to award him.

Respectfully submitted,

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